

THE STATE OF NEW HAMPSHIRE

Department of Environmental Services

Water Council Docket No. 03-14

Appeal of Gerald A. Bell

RECEIVED

DEC 31 2003

ASSENTED-TO MOTION TO STAY

NOW COMES the New Hampshire Department of Environmental Services ("Department"), by and through its counsel, the Office of the Attorney General, and moves for a stay of all proceedings in this matter before the Water Council, including but not limited to canceling the prehearing conference scheduled for January 5, 2004, and the hearing scheduled for January 14, 2004. In support of its motion, the Department states as follows:

1. This matter is an appeal by Gerald Bell ("Appellant") of the Department's decision to deny his request for a waiver of the requirement under Env-Ws 1608.08(f) that no person shall operate a septage facility within five hundred feet of a property line without the consent of the affected abutter. In the appeal, Mr. Bell claims that it was unreasonable for the Department to apply the rule to his preexisting facility, and that the request for the waiver should have been granted.

2. The Department believes that the waiver request was properly denied, and intends to contest the appeal before the Council. Appellant's abutter, Richard Cote, has also intervened in the appeal and supports the Department's decision to deny the waiver.

3. A prehearing conference is scheduled for January 5, 2004, and the final hearing is scheduled for January 14, 2004.

4. On December 29, 2003, Appellant filed with the Merrimack County Superior Court a Petition for Declaratory Judgment Pursuant to RSA 541-A:24 (“Petition”), and provided copies of the Petition to the Council and to the attorneys appearing in the Council proceeding.

5. Among other claims, the Petition asks the Court to rule that the setback requirement under Env-Ws 1608.08(f) is invalid as applied to Appellant’s preexisting septage facility.

6. By statute, “[a] declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.” RSA 541-A:24. The New Hampshire Supreme Court has ruled that a declaratory judgment action under RSA 541-A:24 may go forward even while an administrative challenge to the same rule is pending. Amussen v. N.H. Department of Safety, 145 N.H. 578, 589 (2000).

7. The Department intends to defend the validity of the rule in the Superior Court action. However, if Appellant prevails in his Superior Court action, his appeal of the waiver denial will likely be moot, and there may be no need for a Council hearing in this matter.

8. To preserve the resources of the Council and the parties, it makes sense to litigate the Superior Court issue first rather than proceeding in both simultaneously. This is best accomplished through a stay of the Council proceedings. In the event the Department prevails in Superior Court, the Council can then take up the issue of whether denial of the waiver request was lawful.

9. Counsel for Appellant and Intervener concur with the relief requested in this motion.

WHEREFORE, the Department respectfully requests that the Council:

- A. Issue a stay of all further proceedings in this matter until such time as the issues raised in the Declaratory Judgment action have been resolved;
- B. Cancel the prehearing conference scheduled for 9 a.m. on January 5, 2004;
- C. Cancel the hearing scheduled for 10 a.m. on January 14, 2004; and
- D. Grant such other relief as may be just.


Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorneys,

Peter W. Heed
Attorney General

Date: December 31, 2003


JENNIFER J. PATTERSON
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

Certificate of Service

I certify that a copy of the foregoing Assented-to Motion to Stay has on this 31st day of December 2003, been mailed first class postage paid to Michael P. Bentley, Esquire and Thomas R. Hanna, Esquire.

COPY

Jennifer J. Patterson